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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM LEADER,

Plaintiff and Appellant,

v.

RUSSELL IUNGERICH et al.,

Defendants and Respondents.

B167286

(Los Angeles County Super. Ct.
No. BC267324)

APPEAL from a judgment of the Superior Court of Los Angeles County.

James C. Chalfant, Judge. Reversed.

William Leader, in pro. per., for Plaintiff and Appellant.

Musick, Peeler & Garrett, Mary Catherine M. Bohen and Cheryl A. Orr for
Defendants and Respondents.

Plaintiff and appellant William Leader appeals from a judgment of dismissal following the sustaining of a demurrer without leave to amend to his complaint for legal malpractice against defendant and respondent Attorney Russell Iungerich and his professional corporation. Leader contends the trial court erred when it refused to continue the stay of his legal malpractice action against his criminal defense attorney pending the completion of his timely and diligent pursuit of postconviction remedies to establish his actual innocence. We agree and accordingly reverse.

FACTS AND PROCEDURAL BACKGROUND

Leader, a psychiatrist, was convicted following a jury trial of 14 misdemeanor counts of a violation of Health and Safety Code section 11156, prescribing controlled substances to an addict or habitual user. He was represented during the criminal proceedings by Attorney Iungerich. The jury reached its verdict on January 31, 2001, and Leader was sentenced to five years in county jail on February 5, 2001. At the time of sentencing, Leader requested a continuance in order to be represented by a new attorney, prepare a motion for new trial, and gather mitigating evidence. This request was denied.

Leader timely appealed to the appellate division. He contended Health and Safety Code section 11156 is unconstitutionally vague, the jury instructions were inadequate, he was not charged in the alternative, the term “habitual user” is unconstitutionally vague, the statute of limitations had expired, and he was denied a fair sentencing hearing.

On January 31, 2002, Leader sued Attorney Iungerich for legal malpractice. On May 17, 2002, the parties stipulated to stay the civil proceeding pending completion of the appeal in the criminal case.

On November 21, 2002, the appellate division affirmed Leader’s conviction, but remanded for a new sentencing hearing. On December 23, 2002, the appellate division denied Leader’s request to certify his case to the Court of Appeal. The remittitur issued on January 7, 2003.

On January 13, 2003, the trial court lifted the stay in this civil matter. On February 3, 2003, Attorney Iungerich demurred to the complaint on the ground that Leader could not establish his factual innocence in postconviction proceedings following the affirmance of his conviction by the appellate division.

On January 23, 2003, Leader filed a petition for writ of habeas corpus with this court. He asserted the jury was not properly instructed, the statute of limitations had expired, and Attorney Iungerich had provided ineffective assistance of counsel. On that same date, the petition was summarily denied. On February 3, 2003, Leader filed a petition for review with the Supreme Court.

On March 5, 2003, the trial court sustained the demurrer without leave to amend. On March 18, 2003, the case was dismissed. This timely appeal followed.

On April 18, 2003, the petition for review was summarily denied by the Supreme Court.

On May 8, 2003, Leader was resentenced to three years in the county jail. His second appeal from the May 8, 2003 sentence is pending in the appellate division.

DISCUSSION

“[W]hen a former criminal defendant sues his or her attorney for legal malpractice, the former client’s actual innocence of the underlying criminal charges is a necessary element of the malpractice cause of action.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1197.) A former criminal defendant “must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People’s refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel.” (*Id.* at p. 1205.) The former criminal defendant “must file a malpractice claim within the one-year or four-year limitations period set forth in Code of

Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff's conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies." (*Id.* at pp. 1210-1211.)

In this case, we conclude the trial court prematurely lifted the stay in Leader's malpractice action. Leader has been diligently pursuing his postconviction remedies. He has appealed his conviction and obtained a partial reversal resulting in a remand for resentencing. It is not clear from the appellate record whether the appellate division contemplated the availability of a new trial motion on remand. Leader has been resentenced to a shorter term. It is not clear from the appellate record whether a new trial motion was made at the resentencing. Leader has appealed from the second sentence. That appeal is pending. If the remand encompassed a new trial motion, the second appeal may again consider the merits of the conviction.¹ It is not clear whether Leader is entitled to further state habeas corpus relief following the decision of the appellate division. Leader may also have federal habeas corpus remedies, which may not be ripe until the state court proceedings have been exhausted.

We understand that the "two-track approach" adopted by the Supreme Court in *Coscia v. McKenna & Cuneo*, *supra*, 25 Cal.4th at page 1210, for legal malpractice actions arising out of criminal convictions may result in long delays in the trial court following the filing of a complaint. Nevertheless, the Supreme Court has concluded that this approach best ensures that a plaintiff's claim will not be barred prematurely by the statute of limitations and at the same time best protects an attorney's interest in receiving timely notice and avoiding stale claims. Accordingly, the trial court should stay this action during the period in which Leader timely and diligently is pursuing his postconviction remedies. Those postconviction remedies include both direct appeal and habeas corpus petitions in both the state and federal courts. We note that the trial court

¹ At oral argument, Leader informed us that a new trial motion was made and denied at the resentencing and the denial is an issue in the second appeal.

enjoys considerable discretion to monitor with case management conferences plaintiff's prompt pursuit of his postconviction remedies.

DISPOSITION

The order of dismissal and the order sustaining the demurrer without leave to amend are reversed. The trial court is ordered to stay the proceedings in this case during the period in which plaintiff and appellant William Leader timely and diligently is pursuing his postconviction remedies. Appellant is awarded his costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.